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March 18, 1985

Honorable Paul A. Magnuson
United States District Court Judge
708 Federal Courts Building
St. Paul, Minnesota 55101

Honorable Crane Winton
1307 Mount Curve Avenue
Minneapolis, Minnesota 55403

Re: U.S.A., et al. v. Reilly
Tar & Chemical Corp., et al.
Civil No. 4-80-469

Dear Judge Magnuson and Special Master Winton:

We are writing to you jointly because we believe that Judge Magnuson may want Special Master Winton's recommendation concerning the matters raised in this letter. We are writing to give a status report on this matter, to request a short postponement of the trial date, and to raise other questions.

As we will explain, the parties have taken it upon themselves to continue the oral depositions beyond the March 22 cut-off date. However, the plaintiffs, who have recently added two expert witnesses, Dr. Eula Bingham and Dr. Roy Albert, have stated their unwillingness to agree to a change in the trial date.

STATUS OF CASE

I have told my wife that I would enjoy trying this case more than going to London, and, in any event, London will always be there. She understands. Therefore, the personal plans that I mentioned in my letter of October 1, 1984 should be given no weight whatever in your consideration of this request.

As we have explained recently, we hope to finish discovery within a few weeks of the original schedule, even though this has required a very major commitment by all of the parties and flexibility from the witnesses. Expert witness depositions did not start in December, as hoped when the Case Management Order was drafted, because of the extensive time commitments which were required to meet the early deadlines for exchanging analytical and ground water modelling data, interrogatories, motions for production, requests for admissions and reports of expert witnesses. In addition, there were lengthy meetings regarding settlement, some of which involved technical consultants who are also trial witnesses. Reilly's desire to avoid confrontations and its attempt to comply with the Section 106 order and the State RFRA have also interferred with its trial preparation efforts. Accomplishment of all this required large overtime commitments from the three lawyers from the PCA, three (now four) representing the EPA, and five (sometimes six) representing Reilly, plus substantial para-legal involvement.

The oral depositions of experts and recently-identified fact witnesses started in earnest in mid-February. By splitting the lawyers into various specialty areas and running depositions simultaneously in different cities, we are completing forty depositions consisting of approximately fifty to sixty deposition days, plus travel days, in a seven-week period. However, some things are totally beyond our control (such as the March 3 blizzard) and, as time moves forward, the lawyers see that additional witnesses are needed. Thus, the following delays will impact the schedule:

(1) Although the deposition of Dr. William E. Poel was scheduled for March 4 and 5 in Minneapolis, Dr. Poel and the out-of-state lawyers were stranded by the blizzard in several different cities and it could not be taken. It has been rescheduled for April 1 and 2 in Florida. The blizzard also prevented us from completing the deposition of Steve Riner, which has not yet been rescheduled.

(2) The United States has recently advised that it wants to add two health experts, Dr. Eula Bingham and Dr. Roy Albert. We received Dr. Bingham's report on March 15, but have not yet received Dr. Albert's. We have not yet arranged their depositions. There are no days available until the month of April.

(3) In January, Reilly requested that the United States produce transcripts or tapes of the 1980 proceedings which led up to the establishment of the 1980 criteria for PAH in ambient waters. This will be the subject of a motion before Judge Winton. Reilly believes it is essential to get these tapes or transcripts and take the deposition of an EPA witness who was involved in the 1980 criteria.

(4) I have also recently realized, based on other developments, that an expert in PAH analysis is needed. In various letters that we have written, we have notified the plaintiffs that if questions arise concerning the validity of laboratory analyses, Reilly will be using an expert on that subject such as Dr. Joseph Brooks, Dr. Mason Hughes, or Mr. Gary Wilson. As final trial preparation has evolved, we have stipulated to the admissibility of all laboratory data except that done in-house by the Department of Health. The depositions have revealed that the MDH purchased HPLC equipment in 1978 in order to attempt to detect low levels of PAH. However, there is a difference between possessing the right equipment and operating it in a reliable manner, as many other labs have learned. It sometimes takes years to get consistent, reproducible results. Many of the MDH results appear abberational when compared to the results of the other more experienced labs. In addition, careful examination of the MDH analyses fail to show the contemporaneous use of good quality assurance/quality control procedures.

Even so, we have no assurance that the MDH analyses will not be admitted in evidence in a court-tried case "for whatever weight they deserved." Accordingly, we need (and suggest the Court would want) an expert who has not been directly involved in the prior analyses in order to pull all the data together. After all, the starting point from which all other expert testimony will spring is: What is in the ground water?

Very recently, the United States has been taking additional samples to be analyzed by a lab called "Accurex." However, we have not yet seen the Accurex reports.

A further complicating factor is that Monsanto Research Corporation, Reilly's consultant and the employer of Dr. Mason Hughes and Dr. Joseph Brooks, has gone out of the

business of private consulting, and has merged with its parent corporation, Monsanto Chemical. Dr. Brooks is no longer available and if Dr. Hughes is available at all, his time is limited. Moreover, we have discovered that ERT's chemist, Gary Wilson is married to the EPA's analytical chemist, Joanna Hall.

Within the past weeks, we have been in touch with several analytical chemists whose credentials and objectivity are beyond question. They have been asked whether they would review all of the prior analyses from all labs and to be prepared to give the Court an objective report concerning the totality of the laboratory data. We have identified two such experts. We believe that either could finish his review of the data and submit a report in approximately thirty days.

We expect that the Court might well be critical of all parties if, when the case is tried, there is still a substantial dispute concerning this fundamental question of what is in the ground water, and in what concentrations. Yet it has recently become apparent from the depositions of the health experts that they are all looking at a somewhat different data base. As an alternative to having Reilly retain this additional expert, we would be happy to consider him as a "neutral" expert to be retained by all parties.

(5) Several disputed discovery matters have not been submitted, and, therefore, not resolved. Special Master Winton plays a very important role and generally rules on discovery matters on the spot. However, some recent disputes have not been submitted or briefed simply because the lawyers are otherwise committed. At the Riner deposition, the witness refused to answer questions on the claim of a "deliberative process" privilege. We will be moving to compel answers and will resume his deposition. In addition, the United States has advised that it wants to re-open the Craun deposition which was taken in mid-February, and that it will be moving for additional interrogatory answers or document production with respect to other plants owned by Reilly in other parts of the United States. It has also stated its desire to re-open the deposition of Dr. Walter Spitzer. The State and the United States have stated their desire to re-open the deposition of John Ryan, which was not finished, even though Mr. Ryan had come to Boston from Denver for that deposition. Both he and Ms. Comstock were available on Tuesday and Wednesday, March 12

and 13. However, the plaintiffs' lawyers all left Boston Tuesday afternoon, over Ms. Comstock's objection.

(6) The Court presently has before it the motion of the State of Minnesota to amend its complaint to add a count under MERLA. If the Court permits this amendment, Reilly may need additional discovery concerning the MERLA count.

(7) As revealed by earlier correspondence with the plaintiffs, Noel Kittell, a "historical" witness, became ill a few months ago and his deposition could not be scheduled. His wife now advises that his illness appears to be terminal. Therefore, Reilly is seeking an expert to replace Kittell.

It is obvious from the foregoing that there will not be any gap between the completion of discovery and the April 10 pretrial. Indeed, it is clear that discovery will not be finished by April 10. We have concluded that it will be impossible for us to complete the tasks required by the Case Management Order prior to the pretrial, that is (1) proposed findings of fact, (2) memoranda of contentions of fact and law, (3) designation of portions of depositions to be read, (4) final witness lists, (5) final witness exhibit lists, (6) motions in limine. Nor will the Special Master have any time to force the parties into stipulations of fact or admissibility of evidence.

Our understanding is that cases are not usually given a trial date until after a United States Magistrate has certified that discovery is complete and the case is ready for trial. We understand that the idea is that to start a trial, especially a complicated one, where inadequate attention has been devoted to such things as stipulations of undisputed fact will result in a major waste of time when the case is tried. We have departed from the usual procedures somewhat because this is an old case. Yet, as explained, discovery on Phase I issues (liability and remedy) did not begin in earnest until February 1985. We believe that many weeks of trial time could be saved by suitable fact stipulations.

COURT-APPOINTED EXPERT

Another very important question which may impact the start of trial is whether the Court intends to appoint a Court

expert on the health issues. Judge Lord did that in the Reserve Mining case. In this case, the pretrial reports and depositions of experts indicate that they are taking widely divergent positions. Accordingly, we strongly suggest that a Court expert be appointed. If that is the Court's intent, the appointment process may take a little time. All parties would probably want to offer suggestions as to impartial experts, at least Reilly would.

INTERPRETATION OF CASE MANAGEMENT ORDER

We believe that we also need an interpretation from the Court of the Case Management Order. Paragraph 18 provides that each party which has furnished expert witness reports or summaries "may" file a supplemental report disclosing new information or replying to the adverse parties' reports. It then goes on to state that at the trial the Court will determine whether to admit or exclude testimony which was not revealed, taking into account the problems of trial counsel in preparing for a trial of this magnitude. We have sometimes asked questions at expert depositions as to whether the expert will comment at trial on the reports of our experts, but have been met with objections on the ground of "work product." Recently, I asked Mr. Coyne and Mr. Hird to give us their interpretation of this. However, whatever their interpretation is, we don't want to be in violation of the order on April 3. What does the Case Management Order contemplate with respect to disclosures concerning one expert's possible critique of the report of another expert? We need an interpretation. Moreover, if Reilly's experts are required to critique the reports of opposing experts before trial, it will be very difficult to do that by April 3. We request an extension of that deadline.

The Case Management Order also provides for supplemental reports by April 3. ERT has been asked to re-evaluate all of its recommendations in light of any relevant new data. However, any supplemental reports which might issue from that could not be ready by April 3. We suggest that if the trial date is set back, this date be set back for a similar period. Even if the trial is not set back, we request that the April 3 deadline be extended for fifteen days.

ILLUSTRATIVE EXHIBITS

Finally, we may not be able to comply with the requirement that illustrative exhibits to be used by an expert witness be furnished to opposing counsel thirty days prior to trial, which would be March 29, 1985, if the trial date is not changed.

REQUEST FOR DELAY

On the whole, we submit that the parties have done an extraordinary job in meeting deadlines. Although the Case Management Order was not signed until November 30, 1984, the parties substantially complied with the November 13, December 7, December 14, December 21, December 31, January 8, January 14, January 26 and February 1 deadlines. The discovery cutoff of March 22 was not met only because there are only seven days in the week. As we have said in other documents, Reilly's trial preparation was substantially hindered by the administrative orders issued by the state and federal agencies bringing this lawsuit.

Although the oral discovery is extending beyond March 22 by the mutual agreement of all parties, the state and federal agencies have stated that they cannot voluntarily consent to a delay in the trial date. We submit that they should not be allowed to have their cake and eat it too. The expert witnesses Bingham and Albert have just been added by the United States and as of today, we have no specific assurances as to when they can be deposed. It is obvious that they will not be deposed prior to the scheduled pre-trial on April 10.

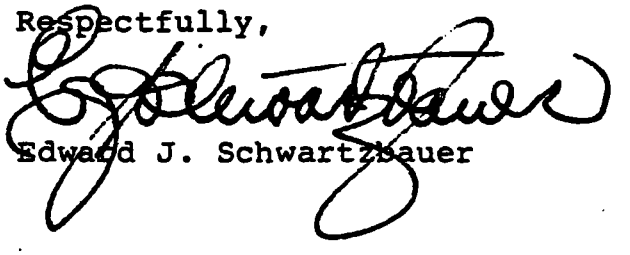
No one really contends that a short delay in the trial or in the construction of a possible treatment plant will raise any health hazard. Reilly contends that a treatment plant may never be needed, and surely is not needed now. But even if we assume for discussion that there is validity to the state and federal plan to build one, the situation in the summer of 1985 will be the same as it has been every summer since 1978. There is a water supply problem which may result in lawn sprinkling bans. But the wells considered by the plaintiffs as contaminated have been closed and remain closed. More importantly, even a long delay in this trial would not

interfere with the Federal power to build a plant with federal dollars, if that is the solution decided upon.

Our specific requests are (1) that a pretrial be held as scheduled on April 10, 1985 to discuss final preparations, including possible stipulations of fact, (2) that additional pretrials be scheduled for May 10, 1985 and June 10, 1985, and that a trial be scheduled no earlier than June 15, 1985. Finally, we note that the Court has never received an estimate from the plaintiffs concerning the estimated length of their case. Reilly should not really be trying to estimate the length of the entire case. We have come to believe that Reilly's case alone will take six weeks or more. We will have twelve experts (six on the health issues and six on the scope of the remedy) and many "fact" and historical witnesses. We believe that an estimate from the plaintiffs at this time would help in the final planning. However, no one can realistically estimate the length of trial unless there is a serious effort to stipulate to many of the facts, especially the history of the plant's operations from 1917-1972.

Please forgive the length of this letter. We are trying to offer constructive suggestions concerning the final stages of trial preparation. We would appreciate your early consideration of these requests. In the meantime, we will move forward to complete discovery.

Respectfully,



Edward J. Schwartzbauer

EJS:ml

cc: All Counsel of Record
Robert Leininger, Esq.
Paul G. Zerby, Esq.

P.S. I discussed this request for delay by telephone with David Hird. I tried to reach the attorneys for the State, but all of them are out of town. I will discuss this with Dennis Coyne in Atlanta tomorrow. If the plaintiffs will change their position and are willing to consent to a delay in the trial, we will, of course, immediately advise the Court.